

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 13, 2005 Session

**KENT A. SOMMER, ET AL. v. JOHN WOMICK, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 03C-1225     Walter C. Kurtz, Judge**

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**No. M2004-01236-COA-R3-CV - Filed July 18, 2005**

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Appellants, Kent A. Sommer and Andrea Sommer, appeal from the dismissal of a legal malpractice action filed by them against John Womick and the Womick Law Firm Chtd. Dismissal was grounded in their failure to file the lawsuit within the 1 year statute of limitations for legal malpractice actions found in Tenn. Code Ann. § 28-3-104(a)(2). The legal malpractice action arose from dismissal of a medical malpractice action filed by Womick in the Sommers' behalf. The trial court held that the oral decision rendered by the federal judge when dismissing the medical malpractice claim was sufficient to alert the Sommers that the dismissal was based upon their lawyers mishandling of the case. The trial court further found the statute of limitations was not tolled by fraudulent concealment. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed and Remanded.**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ, joined.

Joseph P. Bednarz, Sr., Nashville, Tennessee, A.V. Conway, II, Hartford, Kentucky, and Steven R. Walker, Memphis, Tennessee, for the appellants, Kent A. Sommer and Andrea Sommer.

David S. Zinn, Brentwood, Tennessee, and William K. Brandon, Carbondale, Illinois, for the appellees, John Womick and Womick Law Firm Chtd.

**OPINION**

**I. FACTUAL BACKGROUND.**

In 1998, the Sommers retained John Womick and his law firm to represent them in a medical malpractice action against Dr. G. William Davis. A lawsuit was filed on December 3, 1998, in the U.S. District Court for the Middle District of Tennessee. The lawsuit was scheduled for trial on May 22, 2001.

On May 21, 2001, the day prior to trial, a hearing was held pursuant to Rule 104, Fed. R. Evid., to determine the admissibility of the testimony of Dr. Matthew F. Gornet who Mr. Womick planned to call as a witness in the Sommers' behalf. The hearing was held before U.S. District Court Judge William J. Haynes Jr., and the Sommers were in attendance. Following a lengthy proffer of the testimony of Dr. Gornet, Judge Haynes commented on the requirement that, in Tennessee, a medical expert in a medical malpractice case must be able to testify concerning the standard of care in this or a similar community. Judge Haynes noted the inability of Dr. Gornet to satisfy this requirement and that Dr. Gornet based his testimony upon a national standard of care which Judge Haynes observed was insufficient under Tennessee law. Judge Haynes explained that Rule 26 requires the disclosure of an expert's opinion and the bases for that opinion in order to allow an effective cross examination of the expert during trial. He noted that the Rule 26 disclosure for Dr. Gornet failed to state any factual basis for an opinion that St. Louis and Nashville were similar communities and had similar standards of care. Judge Haynes also observed that during Dr. Gornet's testimony, he alluded to having received unspecified demographic data from manufacturers that convinced him the two communities were the same but the Rule 26, Fed. R. Civ. P., disclosure had not been supplemented to include that data. Judge Haynes then ruled as follows:

The Court feels that Tennessee law was sufficiently clear on this subject to provide adequate guidance to plaintiffs and their counsel on what the requirements for the admissibility of expert opinion testimony, what those requirements are in a medical malpractice action. The plaintiff's (sic) counsel have not presented expert testimony that meets the requirements of Tennessee law, nor did they do sufficient work to meet the requirements of Rule 26(a)(2).

Individually and collectively, the Court feels that it would be improper to admit the testimony of Dr. Gornet. And without the testimony of Dr. Gornet, there is no expert testimony for which the plaintiffs could establish a judgment under the Tennessee Medical Malpractice Act.

And for that reason, the Court is going to deny the admissibility of this expert testimony, and this case will be dismissed. We're adjourned.

Following dismissal of the Sommers' case, there is evidence that Mr. Womick stated the dismissal was not his fault, that the Sommers would win an appeal and Dr. Gornet would be allowed to testify. Mr. Womick appealed the ruling of Judge Haynes to the United States Court of Appeals, Sixth Circuit. That court rendered its opinion on January 30, 2003, affirming Judge Haynes. The opinion of the Sixth Circuit Court of Appeals detailed several instances of negligent conduct by the Sommers' attorney, Mr. Womick. The Sommers filed a legal malpractice action against Mr. Womick on April 25, 2003.

On March 12, 2004, a motion for summary judgment was filed in behalf of the defendant, Mr. Womick, on the ground plaintiff's lawsuit was not filed within the statutory period of limitations established by Tenn. Code Ann. § 28-3-104(a)(2). The motion was granted by the trial court on April 27, 2004. The trial judge stated in his Memorandum and Order that "the decision rendered

orally by the Federal Judge was sufficient to alert the plaintiff that the Court ruled against him due to the lawyers mishandling the case.” From the adverse decision by the trial court, the Sommers have appealed and allege the trial court erred in granting the summary judgment because the statute of limitations either had not expired based upon the discovery rule or was tolled due to Mr. Womick’s fraudulent concealment of their cause of action.

## II. STANDARD OF REVIEW.

The standard of review to be applied by this court was set out by the Tennessee Supreme Court in *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995) as follows:

The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tenn. R. Civ. P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as matter of law on the undisputed facts. *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991).

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *Byrd*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion. *Id.*

## III. ANALYSIS.

The statute of limitations for legal malpractice is one year from the time the cause of action accrues. Tenn. Code Ann. § 28-3-104(a)(2). When the cause of action accrues is determined by applying the discovery rule. The discovery rule, as it applies to legal malpractice actions, is composed of two elements: (1) the plaintiff must suffer an actual injury as a result of the defendant's wrongful or negligent conduct, and (2) the plaintiff must have known or in the exercise of reasonable diligence should have known that this injury was caused by the defendant's wrongful or negligent conduct. *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998); *Carvell*, 900 S.W.2d at 28-30.

An actual injury occurs when there is the loss of a legal right, remedy or interest, or the imposition of a liability. An actual injury may also take the form of the plaintiff being forced to take some action or otherwise suffer "some actual inconvenience," such as incurring an expense, as a result of the defendant's negligent or wrongful act. Since a negligent act may not inflict any immediate wrong upon an individual, the right to a remedy will not commence until the individual has suffered some actual loss or inconvenience. *John Kohl & Co.*, 977 S.W.2d at 532; *Carvell*, 900 S.W.2d at 29.

The knowledge component of the discovery rule may be established by evidence of actual or constructive knowledge of an injury sustained as a result of the defendant's negligent or wrongful conduct. *John Kohl & Co.*, 977 S.W.2d at 532; *Carvell*, 900 S.W.2d at 29. Accordingly, the statute of limitations begins to run when the plaintiff has actual knowledge of a negligently caused injury where, for example, the defendant admits to having committed malpractice or the plaintiff is informed by another attorney of the malpractice. Under the theory of constructive knowledge, the statute begins to run when the plaintiff becomes aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained as a result of the defendant's negligent or wrongful conduct. *John Kohl & Co.*, 977 S.W.2d at 532-533; *Carvell*, 900 S.W.2d at 29. There is no requirement that the plaintiff actually know the specific type of legal claim he or she has or that the injury constituted a breach of an applicable legal standard. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998). Rather, the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of wrongful conduct. *John Kohl & Co.*, 977 S.W.2d at 533; *Carvell*, 900 S.W.2d at 29.

Applying these principles to the present case, we find that clearly the Sommers sustained an actual injury when their medical malpractice action was dismissed by the U.S. District Court. Appellants have conceded in their brief that the dismissal was an actual injury. Courts generally recognize that entry of an adverse judgment triggers the running of the statute of limitations in a litigation related legal malpractice action. *Cherry v. Williams*, 36 S.W.3d 78, 84-85 (Tenn. Ct. App. 2000).

We are left with the inquiry as to whether the knowledge component of the discovery rule was met, that is whether the Sommers had actual or constructive knowledge that the dismissal of their medical malpractice case was due to the negligence or wrongful conduct of their attorney, Mr. Womick. In this case, a United States District Judge stated, in the presence of the Sommers, that the law was sufficiently clear to provide adequate guidance to plaintiffs and their counsel on what the requirements for the admissibility of expert opinion testimony was in a medical malpractice action. The judge then said that the Sommers' counsel had not presented expert testimony that met those requirements and, moreover, had not done sufficient work to meet the requirements of Rule 26(a)(2). The fact the Sommers state they did not understand the judge's comments to be critical of their attorney but thought the judge was upset with Dr. Gornet does not necessarily create a genuine issue of material fact that would defeat a motion for summary judgment.

As stated above, the Tennessee Supreme Court has determined that the knowledge component of the discovery rule may be satisfied by constructive knowledge. Constructive knowledge is deemed acquired when a person becomes aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained as a result of another's negligent or wrongful conduct. We agree with the trial court that a reasonable person in place of the Sommers should have become aware of facts sufficient to put them on notice that their expert witness' testimony was excluded and their case dismissed because of the failure of their attorney to produce a witness that complied with the clear requirements of law. Moreover, the statement of the judge that the Sommers' attorneys did not "do sufficient work to meet the requirements of Rule 26(a)(2)" clearly points to dereliction on their part. Even if the Sommers did not understand the reference to Rule 26, they reasonably should have understood that their attorneys failed to "do sufficient work" to comply with a rule of the court. We are satisfied that the exposure of the Sommers to the comments of Judge Haynes was sufficient to impose upon them the constructive knowledge that their attorneys were derelict in their representation with the result that the testimony of the expert witness was excluded and their case was dismissed.

Appellants' assertion that the statute of limitations was tolled by fraudulent concealment of their legal malpractice claim is without merit. The tolling doctrine of fraudulent concealment does not apply to cases where the court finds a plaintiff was aware or should have been aware of facts sufficient to put the plaintiff on notice that a specific injury has been sustained as a result of another's negligent or wrongful conduct. *See Shadrick v. Coker*, 963 S.W.2d 726, 736 (Tenn. 1998) (holding that a plaintiff relying upon the doctrine of fraudulent concealment must show, among other things, that it could not have discovered the wrong despite exercising reasonable care and diligence). This principle is not altered by the fact the Sommers discovered additional acts of negligence following release of the opinion by the Sixth Circuit, United States Court of Appeals. There is no requirement that a plaintiff actually knows the specific type of legal claim he or she has or that the injury resulted from a breach of a specific legal standard. *Kohl*, 977 S.W.2d at 532-533; *Shadrick*, 963 S.W.2d at 733. Rather, a plaintiff is deemed to have discovered the right of action if he or she is aware or should be aware of facts sufficient to put a reasonable person on notice that an injury has been suffered as a result of wrongful conduct. *Carvell*, 900 S.W.2d at 29. The later discovery of additional acts of negligence would not toll the statute of limitations once the discovery rule has initially been satisfied.

We recognize that the strict application of the foregoing principles may produce, as here, what appears to be a harsh result. It is, perhaps, impractical to expect litigants situated as were the Sommers to pursue a legal malpractice claim against an attorney who is handling the appeal from an adverse court ruling. These principles, moreover, are subject to abuse by unscrupulous attorneys who recognize their negligent acts have caused injury to their clients. One of the purposes of our courts of law is to provide a forum where citizens can obtain a remedy for legally recognized wrongs. At the same time we recognize that statutes limiting the time for bringing lawsuits are enacted for the purpose of maintaining tranquility within our society and are not disfavored. *See Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 195 (Tenn. 1973). To paraphrase a statement made by the Tennessee Supreme Court many years ago, the peace of society requires that rights shall be enforced

within a reasonable time and should be barred if they are not. *Peck v. Bullard*, 21 Tenn. (2 Hum.) 41, 45 (1840). Our courts, over the years, have endeavored to balance these competing interests by establishing the precedents cited which we are bound to follow. While the results in a particular case may seem harsh, it is not unfair to require a person, who is aware or should be aware of facts that would put a reasonable person on notice that he or she has a claim against another citizen, to pursue that claim within the time required by our statutes.

#### V. CONCLUSION.

Since we find the appellants' legal malpractice action accrued on May 21, 2001, and the lawsuit was not filed until April 25, 2003, their claim is barred by the statute of limitations. The judgment of the trial court granting defendants' motion for summary judgment is affirmed and this matter is remanded with costs of appeal assessed against the appellants, Kent A. Sommer and Andrea Sommer.

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DONALD P. HARRIS, SENIOR JUDGE